Cassels

Ontario Court Awards 27 Months' Pay in Lieu of Notice Due to "Exceptional Circumstances"

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In *Milwid v. IBM Canada Ltd.*,[1] the Ontario Superior Court discussed the type of "exceptional circumstances" that entitle an employee to a notice period in excess of 24 months, as well as the impact of the COVID-19 pandemic on an employee's common law notice entitlements.

Background

Gregory Milwid was a 62-year-old managerial employee who had worked with IBM Canada Ltd. (IBM) for 38 years. At the time of his termination in May 2020, Mr. Milwid's compensation package included a base salary of approximately $170,000, a pension, comprehensive group benefits, and participation in IBM's equity incentive plans. Although not an executive, Mr. Milwid was a "Band 10" employee, placing him at the director level, immediately below IBM's executive team.

Following his termination, Mr. Milwid brought an action for wrongful dismissal, and the matter ultimately proceeded as a motion for summary judgment. At the hearing of the motion, Mr. Milwid submitted that a reasonable notice period would be 30 months, given his lengthy tenure with IBM, the senior nature of his role, and his advanced age as of the termination date. In addition, Mr. Milwid argued that the unprecedented shutdown of the economy due to the COVID-19 pandemic was either an "exceptional circumstance," or alternatively, a factor in justifying a notice period in excess of 24 months. IBM argued that a 20- to 22-month notice period was appropriate, as Mr. Milwid did not directly manage other employees and did not hold an executive role. It was IBM's position that the character of Mr. Milwid's position militated against an award at the high end of the reasonable notice range and that a range of 22 months and above was reserved for senior-level executives.

Decision

Justice Ramsay ultimately determined that Mr. Milwid was entitled to damages based on a 27-month notice period.

In reaching her decision, Justice Ramsay noted that the COVID-19 pandemic did not, in and of itself, constitute an "exceptional circumstance" warranting a notice period in excess of 24 months. She

acknowledged, however, that economic circumstances can be relevant in determining the appropriate reasonable notice period. Justice Ramsay repeatedly referenced Mr. Milwid's unchallenged evidence that he had applied for over 122 jobs since his dismissal from IBM and had received zero interviews as evidence of the impact the COVID-19 pandemic had had on the economy and job market.

Justice Ramsay confirmed that the appropriate notice period must be determined on a case-by-case basis having regard to the factors set out in *Bardal v. Globe & Mail Ltd.*[2] The following factors supported the conclusion that Mr. Milwid's dismissal amounted to a "forced retirement" and that he was therefore entitled to notice on the high end of the reasonable range:

- Milwid had worked for IBM for 38 years, which represented most of his working life;
- He was terminated at the age of 62;
- Milwid's position was technical and geared towards IBM's specialized business operations; and
- He held considerable responsibility and was entitled to a comprehensive compensation and benefits package in an uncertain economy.

Justice Ramsay acknowledged, pursuant to the Ontario Court of Appeal's decision in *Dawe v. The Equitable Life Insurance Company of Canada*,[3] that while there is no absolute upper limit on what constitutes reasonable notice, exceptional circumstances must exist to support a notice period in excess of 24 months. In determining that exceptional circumstances existed in this case, Justice Ramsay again cited Mr. Milwid's age, length of service with IBM, managerial/specialized role, and compensation package, and concluded that 26 months would be reasonable. She then added an additional month to the notice period, for a total of 27 months, on account of the pandemic and the timing of Mr. Milwid's dismissal. Notably, Justice Ramsay did not cite any additional "exceptional" factors, apart from the *Bardal* factors and economic circumstances at the time of termination, in support of her decision.

Lessons for Employers

Following the Superior Court's decision in *Milwid,* the question of what would constitute "exceptional circumstances" warranting a notice period in excess of 24 months remains unclear. The factors cited by Justice Ramsay in support of the 27-month notice period are, in effect, a repeat of the usual *Bardal* factors for determining reasonable notice (such as age, character of employment, and length of service). If those same factors can serve as evidence of "exceptional circumstances", it would appear that the 24-month "cap" on notice periods as established in *Dawe* could be exceeded in virtually any case involving a senior-level employee with a lengthy period of service. The decision in *Milwid* highlights the importance of ensuring that all employees, and particularly long-serving employees in senior roles, are subject to enforceable employment agreements setting out their entitlements on termination.

If you require assistance in preparing such agreements, or have other employment-related inquiries, please

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[1] 2023 ONSC 490.

[2] (1960), 24 D.L.R. (2d) 140 (Ont. H.C.J).

[3] 2019 ONCA 512.

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